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## ANTI-TRUST LEGISLATION IN KENTUCKY

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Prior to 1890 there was no anti-trust law in Kentucky. The Statutes were silent upon the subject of monopolies and combinations in restraint of trade, and the common law, adopted into the jurisprudence of Kentucky, as decided in the case of *Aetna Life Insurance Co. vs. Commonwealth*, 106 Ky., 864, contained no principle under which these creatures of a new commercial era could be held to a penal liability.

Gradually, however, there crept into the public consciousness the realization that the old order of things was changing; that competition, "the life of trade" in the markets of the country was becoming more and more restrained, and that the purchase and sale of commodities were no longer regulated by the age-old economic law of supply and demand.

On May 20th, 1890, the Legislature of Kentucky joined the general crusade against the evils of the trusts and adopted an act known as the "Anti-Trust Law" being now Chapter 101 of the Kentucky Statutes, of which section 3915 provides as follows:

"That if any corporation under the laws of Kentucky or under the laws of any other State or country, for transacting any kind of business in this State, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a mem-

ber of, or party to or in any way interested in any pool, agreement, contract, understanding, combination, or confederation, having for its object the fixing, or in any way limiting the amount of quantity of any article of property, commodity, or merchandise to be produced or manufactured, mined, bought or sold shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

By the subsequent sections all arrangements made with the intent or having the effect to limit, fix or change the price or production of sale of any article, or to restrict or diminish the output of any article, were declared illegal; no action could be maintained to recover for the price of any article sold in violation of the act upon any contract made in violation of it; all persons, corporations or firms violating the provisions of the act were punished by fine of not less than \$500.00 nor more than \$5,000 and forfeiture of charter, and individuals or officers of corporations were to be punished by fine or imprisonment or both.

In September, 1890, the Constitutional Convention assembled at Frankfort. This body deliberated at some length upon how the trust subject should be dealt with by the organic law. For reasons not definitely stated, the members seemed to be dissatisfied with the law enacted a few months before by the Legislature, a delegate remarking that one could "drive a coach and four through it." A rigorous and detailed section was submitted (Page 3693, Vol. III, Constitutional Debates) which precipitated a very heated discussion. Some feared that the provision would impose upon the farmers of the State, some that the distillers might be discriminated against, and so on, each member zealously solicitous either of the business of which he was a member or of the leading industry in his particular section of the State.

Finally the idea prevailed that the Convention should not attempt to enact a complete anti-trust law, but should merely call attention of the Legislature to this subject in general terms, leaving it unhampered as to detail. Thereupon, Mr. Twyman's amendment to the first proposed section was substituted and adopted, being now Section 198 of the present Constitution, to-wit:

"It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations, or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

The Legislature, however, seemed content with the law as it stood, and took no further action on this subject until 1906. The law remained just as it had been passed in 1890. In 1899 that statute was brought before the Court of Appeals for the first time.

The Aetna Insurance Company and eighty-six others were indicted and convicted in the Franklin Circuit Court on the charge of combining and conspiring to fix rates on fire insurance in the State. Counsel for the Commonwealth and for defendants were not agreed upon the meaning of the term "property" as used in the Statute, the latter contending that the word was qualified by the adjective "manufactured" and consequently did not embrace "property" of any other class, even if the right to enter into insurance contracts was property at all, which was not admitted. In deciding this point, and reversing the judgment of the lower court (*Aetna Insurance Company et al vs. Commonwealth*, 106 Ky., 864) the Court ruled "that although an insurance contract was property and the right to enter into such contract might be property in a sense, the word 'property' as used in the Statutes (Sec. 3915) does not include the right to enter into a contract of insurance nor to fix the terms upon which such a contract will be made;" and that the word only embraced property of the same general class or nature as that described previously by the words, "merchandise and manufactured articles."

The first attack upon the constitutionality of the anti-trust law was made in the case of *Commonwealth vs. Grinstead & Tinsley* (108 Ky., 59) on appeal from the Whitley Circuit Court, a general demurrer having been sustained to the indictment. Affirmance of the judgment was urged mainly upon the following grounds: (1) That the Act of May, 1890, was inconsistent and in conflict with Section 198 of the Constitution and consequently inoperative. (2) That the statute is too indefinite and uncertain to be enforced. In reversing the decision of the lower tribunal, the Court held that Section 198 was not "a grant of power," but the "imposition of a duty;" that the Constitution forbids a combination to depreciate any article below its real value, or to enhance the cost of any article above its real value, leaving the Legislature to enact such laws as would insure this result; that the Legislature was not limited to adopting an act in the language of the constitutional provision; and that if it determined that the provision of the section could best be executed by forbidding a combination to fix, control or regulate the prices or combinations to fix or limit quantity of production, there was an inclusion,

but inclusion was not conflict. The Court disposed of the question of uncertainty in the following language:

"We are unable to see any uncertainty in these provisions. If the Statute had prohibited an unreasonable advance of prices or an unjust depreciation, the question would be different. But no such question is presented. \* \* \* It prohibits *any* combination to regulate or fix prices. It also prohibits *any* combination to limit production. \* \* \* We cannot see how it could be more definite."

In *Commonwealth vs. Bavarian Brewing Company, &c.*, 112 Ky., 925, the Court in reply to the suggestion that the Statute made certain exceptions, said:

"The purpose of the statute is to forbid all combinations to regulate, fix, or control prices and to leave prices to be regulated entirely by the law of supply and demand. \* \* \* The statute makes no such exception. It makes unlawful and undertakes to punish all agreements for the purpose of controlling the prices of the article."

It will thus be seen that in every instance the Court insisted that the statute was all-embracing in scope, unequivocal in meaning, and must be literally enforced.

On March 21st, 1906, the General Assembly passed what is known as the "Pooling Act," which provided:

"It is hereby declared lawful for any number of persons to combine, unite, or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually."

The Act further provided that all contracts entered into for the purpose of carrying out the provision above quoted were legal and binding, and that an agent or agents might be appointed by the parties to the agreement, with authority to hold, grade and sell the products pooled.

On March 13th, 1908, the Legislature by an amendment to the former Act provided remedy in damages and by injunction for violations

thereof, and a fine not exceeding \$250.00 for any person who should sell or buy products without the written consent of the agent in charge. In 1910 a further Pooling Act was passed which is now sections 3941-b, 3941-c and 3941-d of the General Statutes. The first section provided:

“That it shall be lawful for the growers of any kind of farm products to agree to abstain from growing any kind of crops for any given period of season.”

The second provided that it should be lawful for any person or corporation to record a list of the persons pooling products, together with a description of the land upon which the products are to be grown, in the clerk's office in the county where the land is situated; and that any person soliciting or buying such listed property should be subject to fine or imprisonment or both, while the last section is identical in language with that part of section 3941-a quoted with the additional provision that the right to pool should include “products proposed to be raised by them (any persons) whether or not the said crops have been sown, set, pitched or planted.” This completed what is now Chapter 103-a of the General Statutes.

What was the effect of these Pooling Acts? Was it class legislation? Had the Legislature discriminated against any person or class of persons? Were they not in conflict with the anti-trust law of 1890, since by permitting the farmers to “combine” they would be able to “control” the prices of products and by agreeing “to abstain from growing” they could “fix or limit” the quantity to be produced? These were some of the questions with which the Courts were almost immediately confronted.

In 1908 the case of Owen County Burley Tobacco Society vs. Brumback (128 Ky., 137) went to the Court of Appeals on a motion to dissolve an injunction against Brumback restraining him from disposing of his 1907 crop of tobacco which had been pooled with the Burley Society. The validity of the Pooling Act was assailed (1) upon the ground that it was in violation of Section 3 of the Bill of Rights which declared in part that “no grant of exclusive separate public emoluments or privileges shall be made to any man or set of men except in consideration of public service; (2) contrary to section 198 of the Constitution of Kentucky, (3) and in contravention of the 14th Amendment of the Federal Constitution, providing that “no State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

In passing on the question involving the Bill of Rights and the 14th Amendment, the Court said:

"While this section (section 3 of the Bill of Rights) forbids the Legislature from granting exclusive privileges or emoluments, except in consideration of public service, it does not deny the right to select and classify persons or occupations or the right to enact reasonable laws for the government of each class that is dealt with. Looking at the act from this viewpoint, and as simply selecting a class of persons to deal with, it must be considered as within the power of the Legislature to enact it. The act does not attempt to regulate or control or prescribe any other occupation or business. \* \* \* No person is objecting because he is denied the privileges and immunities conferred upon this class of our citizens. It is assailed by one of the class for whose benefits it was enacted, and who upon the record before us must be treated as having voluntarily entered into the agreement authorized by it. Treating the act solely as a selection of a class of persons upon whom special privileges are conferred, it is not in contravention of the 14th Amendment to the Constitution of the United States. This section has been frequently considered by the Supreme Court of the United States, and it has been ruled that it does not deny the State the right to classify and select occupations, trades and professions."

And as to Section 198 of the State Constitution:

The Constitution does not prohibit trusts, pools, or combinations; nor does it command the General Assembly to enact laws forbidding trusts, pools or combinations. The law-making department is left to determine for itself the necessity that exists for legislation upon this question. The section is not self-executing. The Legislature could not enact a law legalizing a pool or combination of persons for the purpose of enhancing the cost of an article above its real value or depreciating it below its real value, yet it may legalize such pool or combination as is created or organized for the purpose of obtaining fair and remunerative prices."

In the case of Commonwealth vs. International Harvester Co. (131 Ky., 551) the questions of discrimination and uncertainty were again raised. A very exhaustive opinion was written by Judge O'Rear, in which a majority of the Court concurred. The Court took the position that the enactments of 1890 and 1906 and section 198 of the Constitution should be construed together, and as though all the provisions thereof were contained in a single act; that when so construed there was no conflict nor any contravention of the Federal Constitution; that all persons were permitted to combine or pool so long as such combination did not operate to raise the price of any article or commodity above its real value or decrease it below its real value; and that, when a combination did result in such condition, it thereupon became illegal and all persons so combining, *farmers included*, became subject to the penal liability provided in the original act of 1890.

The court further held that the statutes were not void for uncertainty; that the "real value" of an article or commodity is "itself a fact susceptible of proof and exact ascertainment. The "real value" spoken of in the Constitution is the market value. Market value depends wholly upon proof of pre-existing facts, and therefore may be known at any moment by anybody."

Judges Barker, Hobson and Lassing dissented to so much of this opinion as held that prosecutions could any longer be maintained under the original Act of 1890. They took the position that the Act of 1906, authorizing farmers to do that which had hitherto been forbidden, repealed the act of 1890 in toto as to farmers and that, if farmers were exempted from its operation, then under the decision of the Supreme Court of the United States, in Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, it could not be enforced against anybody. They contended that the penalties prescribed in the law of 1890 were for "all combinations to regulate, fix, or control prices," and could not apply to a different offense, to wit, "a combination to regulate, fix or control prices *above or below the real value*." As to the standard of "real value," Judge Hobson, in the dissenting opinion said:

"Under the rule now declared by the Court it will be a question for the jury in each case whether the combination raised the price above the real value of the article or lowered it below it. To say that the expression means the market value of the article



when not affected by abnormal conditions, is only to add to the confusion; for what are abnormal conditions, and who is the judge whether the conditions are abnormal? The market value of an article may be determined with some certainty, but what its market value will be under different conditions than those that exist, is speculation pure and simple."

In the case of *International Harvester Co. vs. Commonwealth* (137 Ky., 668) the Court held that to establish a *prima facie* violation of the law, as construed in the opinion by Judge O'Rear, the Commonwealth must show (1) that there had been a combination among all or any of the producers of a commodity or merchandise, by which its output has been restricted or controlled alone by the confederates in the scheme; (2) that the market price of the article was then materially increased; (3) that the conditions affecting commerce in general are normal; (4) that the competition otherwise than for the combination complained of would be fair, and that then the burden shifted to the defense to show exceptional conditions affecting the particular commodity as naturally tended to produce the increase in market price, such as cost of labor, ingredients or constituent parts, transportation or anything else which legitimately affected the selling price of the article as compared with its previous selling price.

The International Harvester Company seems to have been the chief offender against this law, or at least the attention of grand juries throughout the State seems to have been more particularly directed to it. There seems hardly to have been a county in the State which did not return indictments against this concern and conviction followed in almost every instance. Finally the company removed its principal office or place of business from Louisville, Ky., revoked the agency of one upon whom process could be served, and announced that it has ceased doing business in the State. They continued, however, to solicit orders within the State and to receive payment from customers therein. This did not decrease the number or vigor of the prosecutions against it. And the Court of Appeals in 147 Ky., 655, held that process could be duly served upon its representatives remaining within the State, an opinion which was later sustained by the Supreme Court in 234 U. S., 579.

At last the Court of Appeals, having in a period of sixty days affirmed judgments against it aggregating many thousands of dollars and many other cases being then pending, the International Harvester Co.

sought relief in the Supreme Court. The grounds of appeal to that tribunal were the same as had previously been persistently submitted to the State Court, to-wit: (1) that the anti-trust law as construed did not afford the equal protection under the law guaranteed by the 14th Amendment and (2) offered no standard of conduct that it is possible to know. Mr. Justice Holmes, on the 8th of June, 1914, delivering the opinion of the Court, in which a majority concurred, reversing the Kentucky Court of Appeals, upon the question of "real value" as a standard, said:

"Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased efficiency in the machines but with the inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainty of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand. If business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determined facts would be upon the imaginations and desires of purchases, is to exact gifts that mankind does not possess."

So ended and rather ignominiously the anti-trust law of Kentucky. Through the labyrinth of legislation and judicial construction it had wound its way "from the cradle to the grave," losing strength and vitality the while until, with the decision of the Supreme Court, the circle was complete. "Prior to May, 1890, there *was* no anti-trust law in Kentucky." There is none now.

The Legislature will convene with the New Year. An analysis of the situation indicates three possible courses, one of which it may adopt in relation to this subject. First, it can leave matters as they stand, permitting combination to be pitted against combination upon the theory that one may check the other. Second, it can go to the opposite extreme and again prohibit all combinations whatsoever. Third, it can pursue a middle course either by a process of classification or by prohibiting only "unreasonable" restraint of trade.

The first method will hardly be seriously considered. Few would care to see Kentucky a bull-ring for warring combinations, and especially at the invitation of the Legislature. Besides the struggle would be unequal. History has demonstrated that as between the buyer or manufacturer on one side and the producer or consumer on the other, aggression has most often come from the former. Gigantic monopolies, such as the American Tobacco Company, International Harvester Company and the Standard Oil Company, have been composed of originally independent corporate entities. Fortunately most corporations, like individuals, are law-abiding. But the fact remains that the structure of the corporate body is peculiarly adapted to that concentration so necessary to create and maintain a monopoly. This is not true with the producer or consumer and particularly the agriculturist. Rural communities are not sufficiently correlated, each section and each individual being surrounded by different conditions, financial and otherwise, to make even a defensive monopoly possible. The pool legalized by the Legislature of 1906 was called into existence through the domination of the tobacco market by the Tobacco trust. It has not corrected the evils for which it was intended. On the principle of "fighting the devil with fire," it has proved wholly inadequate. Even as I write, a news dispatch states that the fate of the Planters' Protective Association of Kentucky and Tennessee is hanging in the balance, and that, unless 60 per cent of this year's planting is pledged by October 31st, the association must disband. It would seem therefore imperative that the Legislature enact a law of some kind.

Existing economic conditions, however, argue against the iron-clad, all-embracing statute of a quarter century ago. Co-operation is not monopoly. To a certain extent at least, it is true, as the learned Justice observes, "If business is to go on, men must unite to do it," and combinations in business, within reasonable bounds, has not produced the evils

anticipated back in the early nineties, when the subject was new. On the contrary, it has been demonstrated to be necessary and beneficial to all concerned, considering the enormous scale upon which many enterprises are organized and are compelled to operate at this day and time. By legitimate co-operation, the cost of production and the expense of marketing may be decreased while efficiency is increased, much to the advantage of manufacturer and consumer alike. Nowhere is the new conception of dealing with this subject more clearly contrasted with the old than in the Supreme Court of the United States as indicated in the Freight and Joint Traffic cases; 166 U. S., 290; 171 U. S., 505, and the Standard Oil and American Tobacco cases, 221 U. S., 1-116. Therefore, not until it has been proved that monopoly cannot be prevented nor restraint of trade controlled except by an absolute prohibition would it be wise to return to the former statute or to enact a more drastic one.

A middle course, recognizing that it is the abuse of power resulting from combination rather than the combination itself which is harmful, would be more in keeping with the spirit of the age. Such a course could be followed by classification, separating the producer and seller from the buyer and placing the prohibition on the offending class, whichever it might be, leaving the other unrestricted. It would be protested no doubt that this violated the "equality clause" of the Federal Constitution, the contention being based on the ruling in *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, which declared the Illinois anti-trust law unconstitutional because *agriculturists* alone were exempt from its provisions. It will be observed, however, that this statute is more than a classification. It is a discrimination. It does not treat all in the selling class alike. By classification, all classes need not be given equal privileges, but all members within a given class must be. *Agriculturists* were but a single unit within the selling class. If this law had exempted all sellers or vendors and prohibited *all* purchasers it would undoubtedly have been constitutional under the decision of the Supreme Court which upheld the anti-trust law of Missouri (*International Harvester Co. vs. Missouri*, 234 U. S., 199) in an opinion rendered upon the very same day that the Kentucky law was declared unconstitutional. This law prohibited combinations by manufacturers and vendors of articles and sellers of commodities, but permitted it to purchasers of such articles, the court saying:

"The foundation of our decision is, of course, the power of classification which legislation may exercise and the cases we have cited as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the "basis of community." If this power of classification did not exist to what straits legislation would be brought."

But classification in Kentucky would present certain difficulties, from the fact that all the concerns which have been declared monopolies or combinations in restraint of trade are *not in the same class*. If buyers were prohibited, whilst sellers or vendors remained unrestricted, the American Tobacco Company would be controlled, but the Harvester Company, being in the selling class, would not be. If, on the other hand, the prohibition be reversed the Harvester Company would be controlled, but the American Tobacco Company, in the buying class, would escape.

After all, everything being considered, it seems best to enact a law permitting all classes to combine or co-operate so long as there is no monopoly or *unreasonable* restraint of trade. It has been expressly held that there is no constitutional difficulty in the way of enforcing the criminal part of such an act (*Nash vs. United States*, 229 U. S., 373).

Such a law, rigidly enforced, emphasizing the personal liability of officers of offending corporations, carrying with it for violation a heavy fine and forfeiture of charters for corporations and both fine and imprisonment for individuals, would permit farmers and producers to organize for the purpose of grading and storing their products and establishing and maintaining favorable market conditions, and at the same time enable corporations to reduce the cost of production, increase their efficiency and better serve the public, thereby effectually disposing of a thing which has perplexed the Legislature, confused the judiciary and oppressed the people of Kentucky throughout the last quarter of century.